Supreme Court, U. S.
FILED
APR 19 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1506

HONDO DRILLING COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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HONDO DRILLING COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Petitioner, Hondo Drilling Company (hereinafter "Petitioner" or "Hondo"), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 30, 1976, Petition for Rehearing denied on February 26, 1976, notification of which was received March 1, 1976.

OPINION BELOW

The slip opinion of the Court of Appeals (App. A, infra, pp. 1a-13a) is reported at ___ F.2d ___. The Board's Decision and Order is reported at 213 NLRB #32, (App. B, infra, pp. 14a-58a). The opinion enforced

the Board's order requiring Petitioner to bargain with Local 826, International Union of Operating Engineers, AFL-CIO.

JURISDICTION

The decree of the Court of Appeals (App. A, infra, pp. 13a-14a) was entered on January 30, 1976 and the Order denying rehearing en banc was entered on February 26, 1976. Motion for withdrawal of Mandate and Stay of Mandate was granted on March 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The case arose when Hondo withdrew union recognition on November 14, 1973, more than 20 months after the certification year began and after 6 negotiating sessions. The withdrawal was because Hondo had a good faith doubt of the union's continuing majority status based upon (1) 20 months had elapsed since certification; (2) drastic turnover in unit employees occurred during period of certification, with 900% turnover during last six months; (3) the down time of each of 6 rigs between locations; (4) only 3 unit employees who were eligible to vote were still on the payroll at the end of the 20 month period; (5) the unique circumstances of work and employment in the drilling industry in the Permian Basin; (6) the union's unsuccessful attempt to persuade Hondo's employees to stop working for Hondo; (7) the union's unsuccessful attempts to discourage roughnecks from hiring out to Hondo; (8) roughnecks' demand for immediate wage increases coupled with their apparent lack of enthusiasm and saying they were against the

union representing them; (9) the inability of the union to know who was employed by Hondo or to be able to contact them; (10) the union's refusal to negotiate a complete contract as demanded by the union, and making unreasonable proposals of contract items for the first time at the last negotiating session.

The questions presented are:

1. Whether, in the case of withdrawal of union recognition based on alleged good faith doubt, can the Board and reviewing court refuse to consider extremely rapid turnover in personnel as a circumstance that would or could affect an employer's belief, especially in an industry with inherently large turnover?

2. Whether the accumulated circumstances set out above could warrant a good faith doubt of the union's majority status?

3. Whether the NLRB and the reviewing court are required to consider the totality of all of the circumstances in determining Petitioner's asserted good faith doubt, or may they treat the circumstances seriatum?

4. Whether the NLRB and the reviewing court are permitted to substitute their interpretation of the circumstances and the effect on their belief, for that of the Petitioner in determining whether Petitioner could have had a good faith doubt of the union's continuing majority status?

5. Whether the NLRB is permitted to substitute its opinion for Petitioner's good faith doubt; and may the reviewing court uncritically accept such opinion?

STATUTE

". . . the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . .". 28 U.S.C. 160(e), Public Law 61 Stat. 136 §10(e).

STATEMENT OF THE CASE

I.

Proceedings Before The National Labor Relations Board

The Board found Petitioner had violated Section 8(a)(5) of the Act and thus was automatically in violation of Section 8(a)(1), as a result of Petitioner's withdrawing recognition of the union as bargaining representative at the expiration of more than 20 months and after 6 negotiating sessions, on November 14, 1973. On said date Hondo notified the union, by letter, it was withdrawing recognition of the union as bargaining representative of the company's employees because it had a good faith doubt of the union's majority. At no time thereafter did the union offer or attempt to demonstrate its majority in any of the several ways authorized and suggested by the Board. Neither did the General Counsel attempt to demonstrate the union's majority status.

Petitioner is an oil and gas drilling contractor operating in the Permian Basin of West Texas and eastern New Mexico, an area covering approximately 160,000 square miles. It was operating from none to six rigs in that vast area, requiring from 0 to 66 roughnecks (rig employees). During the 6 months period prior to November 14, 1973, Hondo employed 415 crew members to fill a maximum of 78 jobs but with an average of 42 jobs. For the two years following certification, in 1972, the company had an employee turnover of 1500% and 1700% respectively. During the 6 month period prior to withdrawal, the percentage of turnover from two week pay period to two week pay period varied from a low of 17% to a high of 58%, with an average of 35 to 36%. The company employed 971 roughnecks during the 20 months of certification to fill an average need of about 32 roughnecks. Only 3 of the unit employees eligible to vote in February 1972 were still working at date of withdrawal.

During the 318 days prior to withdrawal of recognition, Hondo had no rigs operating 3 days; 1 rig operating 18 days; 2 rigs operating 46 days; 3 rigs working 39 days; 4 rigs working 96 days; 5 rigs working 59 days; and 6 rigs working 57 days. The down time between locations for the rigs varied from 4 days to 139 days.

The union unsuccessfully attempted to persuade Hondo's employees to stop working for it and to discourage roughnecks from hiring out initially to Hondo. The roughnecks demanded immediate wage increases, union or no union, and otherwise exhibited their lack of enthusiasm for the union, including not going to union meetings. The union was unable to

know who was employed by the company and thereby was unable to contact the employees of the company. The union's refusal to negotiate a complete agreement, as demanded by the union prior to the last negotiating session, and its' later making unreasonable proposals of contract items for the first time after the last negotiating session and after 20 months and 6 negotiation sessions. The union's unreasonable proposals included a wage increase of $1.25 per hour or $1.00 more than had ever been proposed before; a shift differential of 15 cents per hour; going to 6 days on and 2 days off in lieu of the 7 day work week, without any change in the above proposed increased rates; all of which would have increased the direct labor costs of Hondo by 140% and far in excess of anything any other contractor in the area was paying. In addition the union demanded the company increase its crew complement by 33 1/3%.

The union had requested that the company come to the last negotiating session ready to negotiate a complete contract. The company did so and presented a completed contract which it was willing and able to sign, but not on a take it or leave basis, but the union refused to even consider or negotiate on the contract.

The union was certified on March 3, 1972 and thereafter there were 6 negotiating sessions as follows: March 28, 1972; July 18, 1972; September 1, 1972; March 13, 1973; August 22, 1973; and October 31, 1973. Another negotiating session had been scheduled for May 5, 1973 but the union's representative failed to appear. The union was furnished a list of names and addresses of employees of Hondo on

September 1, 1972. That was the last list the union had until October 31, 1973 when a new list was furnished.

The employees had demanded wage increases, union or no union.

The union could not and did not know who was employed by Hondo at any given time, except as shown on the list of September 1972, because the union's representative had never been on a Hondo rig location and because of the wide territory covered by the union, according to the union representative's testimony.

Mr. Walter Frederickson, drilling superintendent, made the decision to withdraw recognition because of his good faith doubt grounded upon all of the foregoing circumstances and the inferences that would naturally be drawn therefrom.

The Administrative Law Judge went off on a tangent about "turnover alone" having been ruled by the Board as insufficient legal grounds upon which to base a good faith doubt of union majority. He then cited *Laystrom Manufacturing Co.*, 151 NLRB 1482; but that decision, and specifically the "turnover alone" position of the Board, was overturned by the Seventh Circuit Court which denied enforcement in 359 F.2d 799 (CA-7, 1966).

The Adm. Judge then proceeded to discuss each of the circumstances separately, placing his own interpretation or meaning on such circumstances, and all without regard to their over all relationship to each other and their collective effect upon the mind of Mr.

Frederickson. Since the Adm. Law Judge had concluded, in his own mind, each circumstance standing alone could not justify a good faith doubt, he concluded Mr. Frederickson could not have a good faith doubt. A three member panel of the Board adopted the Adm. Judge's decision without comment.

The Board petitioned the Fifth Circuit Court of Appeals for enforcement of its order.

II.

The Decision Of The Court Of Appeals

The Court of Appeals has upheld the Board's finding that Petitioner violated Sections 8(a)(1) and (5) of the Act by withdrawing recognition from the union and refusing to bargain with it. In doing so, said it was foreclosed from considering the extremely high turnover as an element that might cause the employer to have a good faith doubt; adopted the Board's seriatum elimination of the various grounds of Petitioner's good faith doubt, and adopted the Adm. Law Judge's inferences, reasoning and conclusions and placed its own inferences, reasoning and conclusions to the facts; and did not consider the effects those elements could have on Mr. Frederickson's mind.

REASONS FOR GRANTING THE WRIT

I.

The Issues Presented In This Case Are Of Great National Importance Affecting Millions Of People

The effect of the deceptively simple and completely erroneous decision below is to make every employer-

union bargaining relationship a permanent one, unless an employer can prove actual loss of majority. It is common knowledge it is almost impossible for an employer to prove a loss of majority status of the union without committing an unfair labor practice. Thus, the decision below makes it impossible for an employer to withdraw recognition of a certified union, after the certification year has expired, except by proof of actual loss of majority. This construction finds no support in the language of the Act; is contrary to the legislative history attending the statute; and is inconsistent with the essential holding of this Court in *Franks Bros. vs. NLRB*, (1943) 321 U.S. 702, 64 S.Ct. 817, wherein the Court stated:

> "For the Board order which requires an employer to bargain with a designated unit is not intended to fix a permanent bargaining relationship without regard to new situations that may develop."

It is also inconsistent with the essential holding of this Court in *Brooks vs. NLRB*, 348 U.S. 96, 75 S.Ct. 176 (1954). In that case this Court cited with approval *Celanese Corp. of America*, 95 NLRB 664 (1951), and that Board decision set forth the ground rules whereby an employer may withdraw recognition of the union after the certification year if it has a good faith doubt of the union's majority status.

The effect of the decision below is to deny, under circumstances similar to this case, employees their right to utilize or not utilize a union bargaining representative, and force the employer to bargain with a union in good faith, which will probably result in an inane

and meaningless working agreement; but one which will have the effect of hamstringing the company in its relations with its employees during the period of the contract. How that can promote the free flow of commerce is difficult to see.

If the decision below is allowed to stand, the Board will be able to flout the purposes of the Act requiring Board decisions to be supported by sustantial evidence on the record as a whole, thus affecting the rights of millions of workers and thousands of employers. The Board will be permitted to consider only the evidence it wants to consider and to make all kinds of inferences and surmises without substantiation in the record.

Unions will be permitted to maintain representation status over employees for indefinite periods without knowing who the employees are; without any organizational attempts even though there is a rapid and constant changeover in employees; and no matter how inept the union may be in its ability or desire to actually represent the workers or even know them; or without the employees knowing the union.

The purpose of the Labor Management Relations Act of 1947 is to prescribe the legitimate rights of both employees and employers in their employee-employer relationship and not the union bosses. (29 U.S.C.. §141(b))

II.

The Decision Below Grossly Misstated The Holdings In Several Cases Upon Which The Decision Is Grounded

A. Under headnote 4, 5, pages 7a-11a (App. A), the decision completely misstated the law when, after quoting the turnover facts generally set out above and stating that it was the company's position that it is inconceivable anyone in Frederickson's position would not believe the union did not represent a majority of the company's employees; and foreclosed itself from consideration of turnover by stating:

> "In our view, this only reargues what has been decided in *Hondo*, i.e., that turnover is inherent in this industry and cannot be given independent significance as a sign of union weakness. 513 F.2d at 273."

It cited the consolidated cases of *NLRB vs. Leatherwood Drilling Company* and *NLRB vs. Brahaney Drilling Company*, 5 Cir., 1975, 513 F.2d 270, cert. den'd. No. 75-419, ____ U.S. ____, 96 S.Ct. 449, 46 L.Ed.2d ____ (1975), in which similar arguments under circumstances factually indistinguishable were made and rejected.

The Court in the *Leatherwood* and *Brahaney* cases, *supra*, said:

> "They (respondents) emphasized the magnitude of 900% employee turnover. But in our view, this only reargues what has been

> decided in Hondo, i.e., that turnover is inherent in this industry and cannot be given independent significance as a sign of union weakness. NLRB vs. Hondo Drilling Co., 428 F.2d at 944-946."

There is no such holding in *NLRB vs. Hondo Drilling Co.*, 428 F.2d 943, 944-946. That case did not even discuss "turnover" as such, nor did it hold that turnover is inherent in this industry. It made no reference whatsoever to turnover being related to union weakness or strength. The statement was fabricated out of the whole cloth to support the Court's apparent preconceived and predetermined decision to uphold the Board.

The original *Hondo* case, *supra*, was solely a determination of an eligibility formula for voting and there is nothing in that case to support or justify the Court's statement in the *Leatherwood* and *Brahaney* case, *supra*, or in the instant case, that Hondo decided

> ". . . that turnover is inherent in this industry and cannot be given independent significance as a sign of union weakness."

Since the Court below erroneously foreclosed its consideration of a vital element of Hondo's good faith doubt, it is incumbent upon this Court to grant a writ. Otherwise precedent will be set compounding error upon error.

This is extremely important because the Adm. Law Judge in the companion case argued the same day

before the Court below, *NLRB vs. A.W. Thompson, Inc.*, 216 NLRB #134, admitted that a

> "turnover of 800 employees for a 200 job operation might well create in one's mind a question as to whether a union had retained its majority."

That statement and knowledge was before the Court below in the instant case and is sufficient to require a writ.

If large turnover would be considered as an element of good faith doubt in an industry that has little or no turnover, it is ridiculous not to so consider it in an industry that has inherently large turnover. It is the fact of large turnover that affects the judgment of a person.

III.

The Decision Below Is Clearly And Seriously A Misapprehension And A Gross Misapplication Of The Proper Standards Of Review Of The NLRB Decision And Order As Annunciated By This Court In *Universal Camera Corp. vs. NLRB.*

This case raises substantial and important questions concerning the standards of review followed by the Court below in its enforcement of the NLRB order. It has misapprehended and grossly misapplied the standards of review as taught by this Court in *Universal Camera Corp. vs. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), and is in conflict with that case.

A. The sole issue before the Board was whether Hondo established reasonable grounds as a basis for its good faith doubt of the union's majority status. The Board has set out the guidelines for determining such good faith doubt in *Celanese Corp. of America, supra,* cited with approval by this Court in *Brooks vs. NLRB, supra.* That guideline says the issue must be decided in light of the "totality of all the circumstances". This means when everything is considered together. It was incumbent upon the Board to consider all of the factual elements and then decide if all those factual elements, taken as a whole, could cause a reasonable person in Mr. Frederickson's position to have good faith doubts of the union's continuing majority status. This the Board did not do. Instead, the Board, with the approval of the Court, not only failed to take into consideration all the grounds for doubt, but actually isolated each ground it did consider and found each isolated ground, standing alone, insufficient to be a reasonable basis for a good faith doubt. That is contrary to the teaching of *Universal Camera Corp., supra.*

It was the function of the reviewing court to examine the record and decide if the Board (1) followed its own guidelines set out in *Celanese Corp. of America, supra,* and (2) whether the decision of the Board was supported by substantial evidence on the record. The court failed as to both.

It is clear, even from a casual reading of the opinion, the Court did not require the Board to follow its own guidelines and further neither the Board nor the Court considered the record as a whole in determining whether the totality of the circumstances could cause a reasonable person to have good faith doubts.

Under the teachings of *Universal Camera, supra,* courts must assume responsibility for the reasonableness and fairness of Board decisions. In determining the substantiality of evidence the Court must take into account whatever in the records fairly detracts from its weight. The Court did not even consider possible inferences opposite those drawn by the Board, and yet, the test is the belief of Frederickson of Hondo, not the Board.

B. The Court uncritically accepted and followed the false trail laid out by the Board in misapplying the evidence and its meaning with respect to the controlling question and legal principle.

The question was: Did Frederickson have reasonable grounds for doubting the union's continuing majority status more than 20 months after the certification year began?

The presumption of union majority status is surely based on the reasonable assumption that the union:

1. At least knew on a current and continuing basis who the employees were;

2. At least contacted the employees on some regular basis;

3. Was aware of who the new hires were;

4. Contacted the new hires to seek authorization for representation or union membership; and

5. Maintained close surveillance of employees' working conditions.

None of those elements supporting presumption of union majority status was present in the instant case, but as a matter of fact, the record shows specifically they were not there.

In determining the reasonable grounds, the Board must consider all the reasonable inferences that Frederickson could have drawn from the factual elements and then determined if there was any evidence that would produce contrary inferences.

Some of the factual elements and their logical inferences under the circumstances shown of record in this case are:

1. Fifteen to one turnover in unit employees in one year with rigs scattered over 160,000 square miles — logical inference — union didn't know who worked for the company and thus could not maintain its representative status.

2. The belated and unreasonable proposals made after 20 months and 6 negotiating sessions — inferences — to anyone knowledgeable of competitive wage factors in the industry such unreasonable demands, coupled with the union's unsuccessful attempt to dissuade people from working for Hondo, was bad faith bargaining and an indirect strike.

3. The union attempted to discourage prospective new employees from hiring out and to encourage present employees to quit the company — inferences — since the company continued operation and was successful in securing employees, it would be evident to any reasonable person the union was not effective among the employees in the oil field. The Court below was in error when it stated the reports which Frederickson testified influenced him to withdraw from the union were wholly unsubstantiated by any probative evidence because his toolpusher, Richey, substantiated Mr. Frederickson's testimony on the record. The Adm. Law Judge accepted Mr. Frederickson's testimony provided it was substantiated as to whether or not he was actually told that. The union at no time attempted to contradict that evidence.

4. Roughnecks demanded immediate wage increases, union or no union and said they were against the union representing them — logical inference — this would make it obvious the union did not represent the employees.

5. The Court failed to consider all of the elements presented by Mr. Frederickson and Hondo.

Neither the Board nor the Court considered the fact that the union at no time attempted to prove its majority status at the time of withdrawal of recognition or at

any subsequent time. Neither did the General Counsel attempt to prove the union's majority status.

It can thus be seen that neither the Board nor the Court came to grips with the meaning of "good faith belief" that the union no longer enjoyed majority status. "Good faith belief" does not mean positive proof or belief but only "doubts". What creates a doubt in a person's mind? Usually it is a series or combination of things coming together to cause a belief. If one followed the theory or method of the Board and the Court below, one would never have a belief in anything without positive proof. This is contrary to all logic and common sense.

C. The holding in this case is contrary to fairly recent cases decided by the Board. Those cases are *Taft Broadcasting, WDAF-TV, et al*, 201 NLRB 113 (2-13-73); *Southern Wipers, Inc.*, 192 NLRB 1355 (8-19-71); and *Viking Lithographers, Inc.*, 184 NLRB 16 (7-30-70). In the *Taft* case, *supra*, the Board found:

1. Almost 100% turnover of employees since the last contract;

2. Relative inactivity by the union in recent years; and

3. Expressions of employee dissatisfaction with the union made to company officials.

The Board pointed out that though each factor relied upon by the employer may have weaknesses standing alone, the employer relied upon all of those

factors as a whole and concluded the employer provided sufficient evidence, when considered in its entirety, to cast a serious doubt on the union's majority status.

The other two cases are of similar import and had similar facts.

D. Where the employer presents evidence, considered in its entirety, which casts serious doubt on the union's continuing majority, the burden shifts to the General Counsel to come forward with evidence that the union did, in fact, represent a majority of the employees of the unit. That statement was referred to by the Board in *Taft Broadcasting, supra*. It follows a long line of cases, one of the earliest of which is *Stoner Rubber Co., Inc.*, 123 NLRB 1440. To the same effect see *NLRB vs. J. S. Swift Company, Inc.*, 302 F.2d 342 (CA-7, 1962) and *NLRB vs. Little Rock Downtowner, Inc.*, 414 F.2d 1084 (CA-8, 1969).

E. The Board's decision was not supported by substantial evidence in the record but contrariwise the record conclusively shows reasonable grounds for good faith doubt of the union's majority status.

IV.

The Decision Below Is In Direct Conflict With Decisions In The Sixth, Seventh And Eighth Circuit Courts Of Appeals As Well As With Its Own Decisions.

The Decision below is not only in serious conflict with the decision of this Court in *Universal Camera*

Corp., supra, as described above, but also is in conflict with decisions of other Circuit Courts of Appeal.

Seventh Circuit Court of Appeals. *Ingress-Plastene, Inc. vs. NLRB*, 430 F.2d 542 (1970). In that case, as in the instant case, the Board attacked individually the several grounds of the employers including the factor of significant turnover. The Court of Appeals said the company did not rely on any one reason alone, but rather on all as a whole. It then found the employer had a good faith doubt. This is in conflict with the instant case where the Court below approved the Board's attacking the employer's grounds individually and did not consider them as a whole.

NLRB vs. Laystrom Mfg. Co., 359 F.2d 799 (CA-7, 1966). The Seventh Circuit refused to enforce the Board's bargaining order. The Board's decision (*Laystrom Mfg. Co.*, 151 NLRB #144), cited by the Board in the instant cases, said:

> "Turnover standing alone does not provide a reasonable basis for believing the union had lost its majority status."

The factors were the close vote of 17 to 13 two years before withdrawal of recognition, 16 eligible voters out of 35 left since the election and 8 new employees hired, and the union-shop provision. The Seventh Circuit Court held those factors (as determined by the Hearing Officer) were sufficient to form the basis of a good faith doubt on the part of the employer. The Court also pointed out the union, when challenged, made no effort to disclose its majority status.

Sixth Circuit Court of Appeals. *Phillip Carey Mfg. Co., Miami Cabinet Div. vs. NLRB*, 331 F.2d 720, 734 (CA-6, 1964) (cert. den., 379 U.S. 888). That Circuit Court said there would be substantial ground for doubt concerning the union's majority status after pointing out the closeness of the vote (122 for the union and 112 against), and the large number of strikers who were replaced. It refused to enforce the bargaining order.

Eighth Circuit Court of Appeals. *National Cash Register Co. vs. NLRB*, 466 F.2d 945 (CA-8, 1974). The law judge considered the elements seriatum (as in the instant case) and concluded that none of them individually would constitute a sufficient basis for a good faith doubt. However, the Court said,

> "Considered together we believe that good faith doubt has been demonstrated at least to the point of requiring the General Counsel to come forward with evidence that the union did represent a majority of the employees in the unit on the refusal to bargain date. This the General Counsel did not do."

That Court refused enforcement of the Board's order to bargain.

The approach of the Court of Appeals for the Fifth Circuit to judicial review of the Board's considering seriatum the factual elements forming the basis of an employer's good faith doubt differs from the approach required by *Universal Camera Corp. vs. NLRB, supra*, and from the approach taken by other Courts of Appeal. This difference, it is submitted,

results in the court's holding (1) that the Board did not abuse its discretion in not considering all the elements as a whole in which other courts find an abuse of discretion, and (2) allowing the Board to engage in all kinds of inferences and surmises not supported by the evidence. Such an approach is totally inapplicable to proper judicial review of the Board's decision.

The Administrative Law Judge's inferences and surmises as to the meaning of the various elements forming Thompson's good faith doubt were nothing more than inferences and surmises and do not comport to common knowledge, practices and functions of the unions or common sense. When the Court below accepted those inferences and surmises as fact, it was in conflict with its own decisions in *Poultry Enterprises, Inc. vs. NLRB*, 216 F.2d 798 (CA-5, 1954) and *NLRB vs. Coats & Clark, Inc.*, 231 F.2d 567 (1956).

CONCLUSION

Petitioner respectfully submits that if the decision below is allowed to stand, it will encourage the Board, at least in the Fifth Circuit Court of Appeals area, to fix permanent bargaining relationships regardless of the circumstances.

Therefore, for all the reasons stated herein, this Petition for Writ of Certiorari should be granted and the decision below promptly reversed.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies each of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the herein styled case were mailed to each of the following on the ____ day of April, A.D., 1976:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and

Honorable Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board
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_____

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APPENDIX A

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

HONDO DRILLING COMPANY, N. S. L., Respondent.

No. 74-4006.

United States Court of Appeals, Fifth Circuit.

Jan. 8, 1976.

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case).

Before GOLDBERG and AINSWORTH, Circuit Judges, and NICHOLS,* Associate Judge.

AINSWORTH, Circuit Judge:

This case and a companion case, *National Relations Board v. A. W. Thompson, Inc.*, 5 Cir., 1975, ___ F.2d ____, were consolidated for purposes of argument on appeal. The matter is before us on petition of the National Labor Relations Board to enforce its order of September 11, 1974 against Hondo Drilling Company [Company]. The Board adopted the decision and order of the Administrative Law Judge who had found after a hearing that the Company was in violation of Sections 8(a)(5) and (1) of the National Labor Relations Act by withdrawing recognition from Local 826, Inter-

* Of the U. S. Court of Claims, sitting by designation.

national Union of Operating Engineers, AFL-CIO [Union], as the exclusive representative of the employees in appropriate bargaining unit,[1] and by unilaterally granting Union employees "bottom-hole"[2] pay and across the board wage increases without first notifying and bargaining with the Union over these matters.

The sole issue for determination is whether substantial evidence on the record as a whole supports the Board's findings.[3] We conclude that it does and therefore enforce.

BACKGROUND

The Company is a New Mexico corporation engaged in the business of drilling oil and gas wells in the Permian Basin area which covers approximately 160,000 square miles in West Texas and New Mexico. There are 50 to 60 drilling contractors who operate approximately 300 rigs in the Basin. The Union claims to represent bargaining units for 13 of these contractors. The Company owns six rigs, the use of which is dependent on the number of drilling contracts the Company has at a given time. When in use the rigs are operated on a 24-hour schedule by three crews working 8-hour

1 The unit consists of: All derrickmen, motormen and floorhands, otherwise referred to as roughnecks, employed by the Employer in drilling operations in the area generally known as the Permian Basin, but excluding all toolpushers, drillers, office employees, technical employees, guards, professional employees and all supervisors as defined in the Act.

2 Bottom-hole pay is money paid to employees provided they remain on a particular job until the well is completed, in other words, until the bottom of the hole is reached.

3 *Universal Camera Corp. v. N. L. R. B.*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

shifts. Each crew normally consists of three or four roughnecks and one driller. When the well is completed the rig is moved to a new location or taken out of service until another job is available, and the men are either placed on the out-of-work list or transferred to another drilling site, depending on the availability of work and the desire of the men to transfer. The shortest time any rig drilled at one location was 4 days; the longest, 59 days. As a consequence of these circumstances, there is an unusually high employee turnover.

In 1967 the Union sought certification to represent the Company's roughnecks. Because of the high turnover of employees and their relatively short periods of employment, the Board devised a formula to determine voting eligibility.[4] On September 8, 1967, after an election which the Union won by a 26-to-6 vote (with 5 challenges), the Union was certified as the representative of the Company's drilling employees. Hondo refused to bargain in order to contest the certification and the "Hondo formula." The Board found the Company in violation of the Act, and its order directing the Company to bargain was upheld by this Court in *N.L.R.B. v. Hondo Drilling Company*, 5 Cir., 1970, 428 F.2d 943, in which we approved the voting eligibility

4 The formula limits eligibility to vote

> ". . . to all roughnecks who have been employed by the Employer for a minimum of 10 working days during the 90-calendar-day period preceding the issuance of our Decision and Direction of Election herein, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed, as well as all roughnecks whose names appear on the Employer's payroll list immediately preceding the issuance of the Regional Director's Notice of Election in this proceeding." 164 N.L.R.B. 416, 418.

formula. Thereafter, following a period of unsuccessful contract negotiations, the Company filed an election petition with the Board. The ensuing election was again favorable to the Union by a vote of 28 to 2 (with 2 votes challenged) and the Union was certified for a second time on March 3, 1972.

Contract negotiations resumed, with J. D. Fortenberry and Kenneth Howell representing the Union, and Brooks L. Harman, attorney, and Walter Frederickson representing the Company. Five negotiating sessions were held during the period between the second Union certification and October 31, 1973, at which proposals and counterproposals were exchanged concerning virtually every phase of labor-management relations, including wage increases, holidays, vacations, overtime, hiring hall and arbitration procedures, a no-strike clause, and duration of the proposed contract. Although agreements on a number of proposals were reached, the parties remained at an impasse on certain items and no contract was executed. On August 5, 1973, the Company instituted "bottom-hole" pay for roughnecks working on Rig No. 3 without prior discussion or agreement with the Union. At the sixth negotiating session on October 31, 1973, the Company submitted a proposed bargaining agreement for consideration by the Union membership. The Union rejected the proposal and Fortenberry informed the Company of its rejection on November 12, 1973, at which time he offered eight counterproposals and requested a date for further negotiations. Two days thereafter the Company withdrew recognition from the Union by letter in which Mr. Harman, attorney for the Company, announced:

> "Mr. Walter Frederickson telephoned me this morning and stated the company does not believe the Union represents a majority of bargaining unit employees and, therefore, refuses to recognize [the Union] . . . as the bargaining representative of its employees."

On the same day, November 14, 1973, and subsequently on December 3, 1973, the Company unilaterally put into effect new hourly wage increases.

FINDINGS AND CONCLUSIONS OF THE BOARD

The Board refused to ascribe bad-faith bargaining to the Company during the period under consideration — May 19, 1973[5] to November 14, 1973 — concluding that the Company's conduct amounted to no more than hard bargaining not condemned by the Act. The Board concluded nevertheless that the Company violated Sections 8(a)(5) and (1) of the Act by engaging in the following unfair labor practices: (1) in withdrawing recognition from the Union in November 14, 1973 as the exclusive representative of the employees in the aforesaid appropriate unit, and by thereafter refusing to resume negotiations and bargain with the Union, and (2) in unilaterally granting its employees bottom-hole pay on August 5, 1973, and across-the-board wage increases on November 14 and December 3, 1973, without first notifying and bargaining with the Union over these matters.

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5 The cut-off date under Section 10(b) of the Act, which provides that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.

THE UNILATERAL ACTIONS OF THE COMPANY

A. *Bottom-Hole Pay*

The Company attempts to justify this unilateral action by the urgency of the circumstances surrounding it. Frederickson testified that because of the unusually dangerous aspects of the particular job at Rig No. 3 and the great distance between the rig and the men's living quarters, an incentive was needed to employ a sufficient number of men who would remain on the job until the well was completed. He further testified that bottom-hole pay had been paid in 1969 to certain employees under similar circumstances and that he had consulted with Mr. Harman who advised him that the bottom-hole pay was not a negotiable matter inasmuch as Frederickson had done it before and it was customary in the oil fields.

[1-3] The payment of wages is a statutory subject of collective bargaining under Section 8(d) of the Act, thus requiring that the matters of salary increases and bonus awards be submitted to the mediatory influence of collective bargaining. *See Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 214, 85 S.Ct. 398, 405, 13 L.Ed.2d 233 (1964). This is not a case where the Company, after a fruitless attempt to negotiate the bottom-hole bonuses, put into effect the proposed awards. *See N.L.R.B. v. Crompton-Highland Mills*, 337 U.S. 217, 224-225, 69 S.Ct. 960, 963, 93 L.Ed. 1320 (1949). The Company admits that it unilaterally granted the bottom-hole awards on August 5, 1973,without having first discussed the subject with the Union, an action conspicuously incompatible with the principle of

collective bargaining. Its good-faith belief that its action was necessitated by the emergency nature of the situation did not excuse its failure to afford the Union the opportunity to negotiate the matter. While negotiations need not be exhausted to the point of impasse, some discussion is required prior to changing a condition of employment, *N.L.R.B. v. Citizens Hotel Company*, 5 Cir., 1964, 326 F.2d 601.

B. *Across-the-Board Wage Increases of November 14 and December 3, 1973*

The propriety of the salary increases, having been effected subsequent to the Company's withdrawal of Union recognition, is dependent upon the validity of that withdrawal, that is, upon whether the Company had reasonable and good-faith grounds for doubting the Union's continued majority status, *see N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 597, 89 S.Ct. 1918, 1931, 1932, 23 L.Ed.2d 547 (1969); *N.L.R.B. v. A. W. Thompson, Inc.*, 5 Cir., 1971, 449 F.2d 1333, 1336, *cert. denied*, 405 U.S. 1065, 92 S.Ct. 1497, 31 L.Ed.2d 795 (1972); *N.L.R.B. v. Gulfmont Hotel Company*, 5 Cir., 1966, 362 F.2d 588, 589. This brings us to a consideration of the reasons asserted by the Company as a basis for its action in withdrawing recognition from the Union.

THE COMPANY'S WITHDRAWAL OF UNION RECOGNITION

[4, 5] Following a valid Board certification of a union, there is an irrebuttable presumption that its majority status continues for one year, in the absence of special or unusual circumstances. *Brooks v. N.L.R.B.*,

348 U.S. 96, 98, 75 S.Ct. 176, 178, 99 L.Ed. 125 (1954); *N.L.R.B. v. Anvil Products, Inc.*, 5 Cir., 1974, 496 F.2d 94, 96; *N.L.R.B. v. Gulfmont Hotel Company, supra*, at 589; *N.L.R.B. v. Leatherwood Drilling Company*, 5 Cir., 1975, 513 F.2d 270, *cert. denied*, ___ U.S. ___, 96 S.Ct. ___, 46 L.Ed.2d ___ (1975). After the first year that presumption is rebuttable upon a showing by the Company that it had a good-faith doubt of the Union's continued majority status. *N.L.R.B. v. Gissel Packing Co., supra*, 395 U.S. at 597, 89 S.Ct. at 1981, 1982; *N.L.R.B. v. Leatherwood Drilling Company, supra*, at 272; *N.L.R.B. v. A. W. Thompson, Inc.*, 5 Cir., 1971, 449 F.2d 1333 at 1336. Before the Board the Company urged, as it does on appeal, that its withdrawal of Union recognition was indeed based on its good-faith doubt of the Union's continuing majority, asserting as a basis therefor (1) the unusual high labor turnover, (2) the Union's refusal to bargain in good faith on and after October 31, 1973 and its unreasonable counter-proposals subsequently submitted for the first time, (3) the Union's efforts to discourage prospective employees from working for the Company and to encourage those employed to quit, and (4) the apparent lack of employee enthusiasm for the Union. The Board rejected each of the considerations advanced by the Company as a foundation for a reasonable doubt. Our review of the record convinces us that it supports the Board's findings.

A. *Employee Turnover*

The Company contends that because of the extremely high rate of employee turnover in the drilling industry, the situation is somewhat unique, requiring

an exception to the normal presumption of continued Union representative status. Illustrative of this fluctuation in rig personnel, the Company calls attention to evidence which shows that during the 6-month period prior to November 14, 1973, it employed 415 crew members to fill a maximum of 78 jobs. For the two years following certification in 1972, the Company had an employee turnover of 1500 and 1700 per cent, respectively. The percentage of turnover of roughnecks from pay period to pay period during the 6-month period under consideration varied from a low of 17 per cent to a high of 58 per cent, an average of 35 per cent to 36 per cent turnover between pay periods. The Company contends that the drastic turnover situation was one of the primary reasons that it doubted the Union's majority status, that the Company through Frederickson was aware that very few roughnecks remain with the company constantly and that during the 20 months of certification, out of 971 roughnecks employed only 3 of the unit employees eligible to vote in the February 1972 election were still working for the Company in November 1973 when union recognition was withdrawn. It is the Company's position that because of this extremely high turnover, sometimes reaching more than 100 per cent in a pay period, it is inconceivable that anyone in Frederickson's position would not believe the Union did not represent a majority of the Company's employees.

This argument is foreclosed by our decision in the consolidated cases of *N.L.R.B. v. Leatherwood Drilling Company* and *N.L.R.B. v. Brahaney Drilling Company*, 5 Cir., 1975, 513 F.2d 270, *cert denied*, ___ *U.S.*

___, 96 S.Ct. ___, 46 L.Ed.2d ___ (1975), in which similar arguments under circumstances factually indistinguishable were made and rejected. Leatherwood and Brahaney, like Hondo in the present case, are drilling companies operating in the Permian Basin. They too are represented by Local 826, International Union of Operating Engineers, AFL-CIO, which was certified following an election in which the "Hondo formula" was used for determining voter eligibility. Both Leatherwood and Brahaney withdrew recognition from the Union because of their alleged good-faith doubt of the Union's continuing majority. Unfair labor charges were filed, and in subsequent proceedings in which the companies were represented by Mr. Harman, the same attorney representing the Company here, the Board found both companies to be in violation of Sections 8(a)(5) and (1) of the Act. This finding was made despite a 900 per cent employee turnover evidencing that less than 4 of the original certification voters out of approximately 77 employees, in each case, had remained on their jobs. The Board noted that counsel Harman was "highly familiar with the history of organization by this Union in the Permian Basin." 513 F.2d at 273. On appeal the sole issue for review was whether substantial evidence on the record considered as a whole supported the Board's findings that neither Leatherwood nor Brahaney had reasonable grounds for doubting the Union's continued majority status. In enforcing the Board's order we said, with regard to the emphasis placed by Leatherwood and Brahaney on the magnitude of the employee turnover, "[I]n our view, this only reargues what has been decided in *Hondo*,[6] i.e., that turnover is

6 *N.L.R.B. v. Hondo Drilling Company*, 5 Cir., 1970, 428 F.2d 943.

inherent in this industry and cannot be given independent significance as a sign of Union weakness." 513 F.2d at 273.

B. *The Union's Alleged Refusal to Bargain in Good Faith on and after October 31, 1973, and Its Alleged Unreasonable Counterproposals*

At the October 31 meeting the Company submitted a new proposed contract which contained several provisions to which Howell, representing the Union, voiced his objections. Included among the objectionable provisions were a non-mandatory arbitration clause, a clause reserving to the Company the unilateral right to grant subsistence allowances to employees, and a clause recognizing the Company's unilateral right to grant wage increases to meet competition. Howell said he would call a meeting to vote on the Company's proposals and would advise the Company of the employees' decision. On November 12 the Company was advised by letter of the Union's rejection of the proposed contract. The letter also contained eight counterproposals, four of which embodied new demands relating to a union shop for the Company's New Mexico operations, shift differentials, a cost-of-living escalator clause, and free meals for employees working beyond two hours of their usual quitting time. Despite the fact that the Company's proposed contract contained new items as well as items previously rejected by the Union, the Company contended before the Board that the new Union proposals, submitted after six negotiating sessions, were unreasonable, constituted bad-faith bargaining and led Frederickson to believe that the Union was not

seeking a contract. This belief, the Company contends had a big influence on Frederickson's doubt of the Union's majority status. We are unable to follow the logic of this conclusion. As the Administrative Law Judge observed when considering this contention, there is nothing in the Union's proposals "which could reasonably suggest to the Respondent that its employees had rejected union representation. The most that can be said is that the Union was seeking better contract terms than those the Respondent was offering."

C. *The Union's Alleged Efforts to Discourage Prospective New Employees and to Encourage Present Employees to Quit the Company*

Assuming *arguendo* that the Company allegations of Union members dissuading roughnecks from working for the Company were substantiated by the record, it is difficult to determine how the Company inferred therefrom that the Union no longer represented the majority of its employees. At most such conduct implies employee dissatisfaction with the Company. However, it is unnecessary to speculate on the Company's theory since the Board found, and the record supports that finding, that the alleged reports which Frederickson testified influenced him to withdraw recognition from the Union were wholly unsubstantiated by any probative evidence.

D. *Alleged Lack of Employee Enthusiasm for the Union*

The Company attributes inquiries made by the roughnecks relative to when they would receive wage

increases comparable to increases received by roughnecks employed by other drillers, to lack of enthusiasm for Union representation. The Board was unable to find anything in these inquiries which demonstrate displeasure with union representation, nor can we.

Enforced.

United States Court of Appeals
For the Fifth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

HONDO DRILLING COMPANY, N.S.L.,
Respondent.

JUDGMENT

Before: GOLDBERG and AINSWORTH, Circuit Judges, and NICHOLS,* Associate Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Hondo Drilling Company, N.S.L., Midland, Texas, its officers, agents, successors, and assigns, on September 11, 1974. The Court heard argument of

* Of the U.S. Court of Claims, sitting by designation.

respective counsel on November 3, 1975, and has considered the briefs and transcript of record filed in this cause. On January 8, 1976, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, Hondo Drilling Company, N.S.L., Midland, Texas, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: Jan. 30, 1976

APPENDIX B

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[September 11, 1974]

DECISION AND ORDER

On May 20, 1974, Administrative Law Judge Paul Bisgyer issued the attached Decision in this proceeding. Thereafter, General Counsel filed exceptions and a supporting brief, and Respondent filed exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusion[2] of the Administrative Law Judge and to adopt his recommended Order.

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ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby

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1 The Respondent and General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

Additionally, we are satisfied that the Respondent's exception that the Administrative Law Judge was biased is without merit. In our opinion there is nothing in the record to suggest that his conduct of the hearing, his resolutions of credibility, or the inferences he drew were either based on bias or prejudice.

2 We have considered the Respondent's asserted reasons for doubting the Union's majority status in their totality and find, in agreement with the Administrative Law Judge, that all the circumstances pointed to by Respondent, considered together, do not establish reasonable grounds for believing that the Union had lost its majority status since its certification.

orders that the Respondent, Hondo Drilling Company, N.S.L., Midland, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C., September 11, 1974.

Edward B. Miller, Chairman

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[May 20, 1974]

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DECISION

Statement of the Case

PAUL BISGYER, Administrative Law Judge: This proceeding with all the parties represented, was heard on February 12 and 13, 1974 in Odessa, Texas, on the

complaint of the General Counsel issued on January 3, 1974, as subsequently amended,[1] and the

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amended answer of Hondo Drilling Company, N.S.L., herein called the Respondent or the Company. In issue are the questions whether the Respondent since May 19, 1973[2] bargained in bad faith with Local 826, International Union of Operating Engineers, AFL-CIO, herein called the Union, as the certified representative of the Company's employees; whether the Respondent on three occasions unilaterally changed existing wage rates and other terms and conditions of employment; and whether the Respondent on and after November 14, 1973 withdrew recognition and refused to resume bargaining with the Union — all in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended.[3]

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1 The amended complaint is based on an original and first and second amended charges filed by Local 826, International Union of Operating Engineers, AFL-CIO, on November 19 and December 12, 1973 and January 24, 1974, respectively, copies of which were duly served on the Respondent by registered mail on the respective filing dates.

2 The 6-month limitation period prescribed in Section 10(b) of the Act bars the finding of unfair labor practices committed before this date.

3 Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Insofar as pertinent, Section 7 provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his

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At the close of the hearing, all the parties waived oral argument. Thereafter, briefs were filed by the General Counsel and the Respondent.

Upon the entire record, and from my observation of the demeanor of the witnesses, and with due consideration being given to the argument advanced by the parties, I make the following:

Findings and Conclusions

I. The Business of the Respondent

The Respondent, a New Mexico corporation with its principal office and place of business in Midland, Texas, is engaged in the business of drilling oil and gas wells in the Permian Basin area in Texas and New Mexico. During the 12-month period immediately preceding the issuance of the complaint, the Respondent in the regular course of its business performed services valued in excess of $50,000 for customers located outside Texas. During the same period, it also purchased materials valued in excess of $50,000 directly from sources located outside the State.

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employees" designated by a majority of the employees in an appropriate unit.

As no evidence was adduced to substantiate the allegation of the amended complaint that on or about November 14, 1973 Drilling Superintendent Walter Frederickson threatened employees that the Company "would stack the rigs" (meaning remove from service) if the employees did not accept, and if the Union did not approve, a 40-cent hourly wage increase, the allegation is dismissed.

It is conceded, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

I find, in agreement with the parties, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Introduction; the Union's Certifications; Issues*

The Respondent is one of the smaller drilling contractors in the Permian Basin area covering approximately 160,000 suqare miles in West Texas and New Mexico where some

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250 drilling rigs owned by various companies have been in daily operation during the past year. The Respondent has six rigs whose use depends on the number of drilling contracts it has at a particular time. When all six are in service, a maximum of 66 roughnecks[4] are employed to run them. In charge of each rig is a toolpusher who is directly responsible and reports to Drilling Superintendent Walter Frederickson. The rig is operated around the clock by three crews, with

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4 Derrickmen, motormen and floormen, who are the rank and file employees of a drilling crew, are generally referred to in the trade as roughnecks. On occasion, drillers, who are their immediate supervisors, might also be included in the roughneck terminology.

each working an 8-hour shift, until the well is completed.[5] A crew consists of three or four roughnecks and a driller who hires and supervises them and whose job it is to see that the rig functions properly. Upon completion of a well, the men are transferred to other drilling jobs, if work is available and they want to go there; otherwise, the men are placed on the out-of-work list. According to Frederickson, very few roughnecks remain in the Respondent's continuous employ. It appears that until a year or a year and a half ago, roughnecks were unemployed for 30 to 90 days a year but that since then there has been a shortage of help in the oil fields and consequently less slack in employment.

In 1967, the Union filed a petition with the Board to represent the Respondent's roughnecks. Because of the unusual high turnover among these employees and the relatively short periods of their employment with the Respondent, which is apparently common in the oil drilling industry in the Permian Basin area, the Board devised what has come to be known as the *Hondo* formula for determining eligibility to vote

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in a directed representation election.[6] Having won the subsequent election held in accordance with this

5 According to figures furnished by the Respondent for the period of January 1, 1973 through November 14, 1973, it took its rigs from 18 to 59 days to complete a well and some as long as 96 days on infrequent occasions.

6 164 NLRB 416, 418. This formula, which has been subsequently applied in Board-conducted elections involving roughnecks employed by other drilling companies in the area, limits eligibility to vote

> . . . to all roughnecks who have been employed by the Employer for a minimum of 10 working days during the 90-calendar-day period preceding the issuance of our Decision and Direction of Election herein, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed, as well as all roughnecks whose names appear on the Employer's payroll list immediately preceding the issuance of the Regional Director's Notice of Election in this proceeding.

eligibility rule by a vote of 26 to 6 with 5 challenges, the Union was certified by the Board on September 8, 1967 as the exclusive representative of the Respondent's employees in an appropriate unit.[7] To test the certification and the *Hondo* rule, the Respondent refused to bargain with the Union. This resulted in a Board order finding the Respondent in violation of Section 8(a)(5) and (1) of the Act[8] and directing it to bargain with the Union. The Court of Appeals for the Fifth Circuit sustained the reasonableness of the *Hondo* rule and bargaining order.[9]

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Following enforcement of the Board's bargaining order, the Respondent and the Union engaged in contract negotiations which extended well beyond a year. However, no agreement resulted from these efforts and the Respondent filed an election petition with the

7 This unit, which the parties concede to be appropriate for collective bargaining purposes, consists of:

> All derrickmen, motormen and floorhands, otherwise referred to as roughnecks, employed by the Employer in drilling operations in the area generally known as the Permian Basin, but excluding all toolpushers, drillers, office employees, technical employees, guards, professional employees and all supervisors as defined in the Act.

8 171 NLRB 1399.

9 428 F.2d 943; see also *N.L.R.B. v. Rod-Ric Corporation*, 428 F.2d 948 (C.A. 5), enfg. 171 NLRB 922; *N.L.R.B. v. Brahaney Drilling Company*, 432 F.2d 1271 (C.A. 5), enfg. 176 NLRB 289.

Board (Case No. 16-RM-448). An election was held which the Union also won by a vote of 28 in favor of representation and 2 against with 2 votes being challenged. Evidently, the *Hondo* formula was utilized to determine eligibility. On March 3, 1972, the Union was again certified as the exclusive representative of the Respondent's roughnecks.

As will be discussed below, further negotiations between the parties ensued[10] until the Respondent, by letter dated November 14, 1973, notified the Union that it questioned the Union's majority status and that it accordingly withdrew recognition. It is the General Counsel's position that the Respondent did not bargain in good faith; that both before and after its withdrawal of recognition the Respondent unlawfully raised wages and changed a term of employment without consulting the Union; that, in the context of these unfair labor practices, the Respondent was precluded from questioning the Union's majority status; and that, in any event, the Respondent failed to demonstrate that its withdrawal of recognition was based on objective considerations justifying a good-faith doubt that the Union any longer represented the Respondent's roughnecks. The Respondent, however, insists that it had reasonable grounds for believing that 20 months after the Union's second certification the Union had lost its majority status and that the Respondent did not raise the question of the Union's

10 It appears that while these negotiations were in progress the Union was also involved in representing the roughnecks of 12 other drilling contractors in the Permian Basin area on an individual employer basis. It further appears that the Respondent's attorney represents most of these employers in their dealings with the Union and that a member of his law firm acts on behalf of two drilling contractors.

majority in the context of bad faith bargaining or other unfair labor practices. We turn to the evidence.

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B. *The Evidence*

1. Contract negotiations and related events preceding May 19, 1973[11]

Following the Union's second certification, the Union and the Respondent held four bargaining sessions before May 19, 1973. The Union's negotiator at these meetings was Senior Business Representative J.D. Fortenberry, while the Respondent was represented by its attorney, Brooks L. Harman and Drilling Superintendent Walter Frederickson.[12] At the opening of their first meeting of March 28, 1972, Harman rejected Fortenberry's suggestion that they begin their bargaining from the point they had left off when the Respondent filed its above-mentioned election petition. This led to a discussion of various matters, including holidays, vacations, overtime and a referral

11 In view of the 6-month limitation proviso in Section 10(b) of the Act, the events preceding May 19, 1973 are set forth only as background to shed light on subsequent alleged unfair labor practices encompassed by the amended complaint. It appears that the delays and infrequency of negotiation meetings are characteristic of the industrial relations scene involving the oil and gas drilling industry in this area.

12 Although Frederickson testified that any complete agreement reached with the Union was subject to the approval of the Company's president and Board of Directors, I find, contrary to the implication in the General Counsel's brief, that Frederickson and Harman possessed sufficient authority to negotiate a contract and that their authority was not so circumscribed as to reflect adversely on the Respondent's performance of its bargaining obligation.

hall. Nothing significant developed from this meeting except that Harman stated that the Company would consider some type of a vacation plan and Fortenberry agreed to send Harman the Union's written proposal of a hiring hall procedure. Two days later, the Union mailed its referral hall proposal to Harman.

The next meeting took place on July 18, 1972.[13] The Union's hiring hall proposal came up for discussion. As it was not entirely satisfactory to the Respondent, Fortenberry agreed

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to submit a modified proposal. Also considered at this time was the duration of a contract. The Respondent asked for a 1-year term with a wage reopener clause while the Union indicated preference for a longer period. Finally, the Respondent accepted the idea of a 1-week vacation after a year's employment. However, the Respondent would limit this right to employees whose service was interrupted during the year by a total of less than 60 days. The Union, on the other hand, would enlarge this period to 90 days and Harman undertook to draft a vacation provision satisfactory to both parties. The meeting ended without any definite agreement reached on any subject. Later in the day Fortenberry mailed to Harman a modified hiring hall proposal as he had promised to do. In this letter Fortenberry also reminded Harman that Harman had

13 Fortenberry did not attend a negotiation meeting on May 5, 1972, which Harman testified he had scheduled. However, Fortenberry denied ever receiving written notice of such a meeting which Harman testified he had sent. There is absolutely no purpose to resolve this dispute.

agreed to submit "a draft of the proposed contract" and a current list of employees and their addresses.

On September 1, 1972, negotiations resumed. At this meeting, Harman handed Fortenberry a list of employees and proposed vacation and holiday provisions. Discussions ensued, among other things, concerning these proposals, contract duration and a hiring hall. However, the parties remained in dispute with respect to the 60- or 90-day qualifying condition and the contract term which the Respondent still wanted to be for 1 year and the Union for a longer period. As for the hiring hall, the Company stated that it had no objection to its drillers using that facility to secure help but that it opposed the inclusion of such a clause in a contract. At the end of the meeting, Fortenberry requested Harman to submit a draft contract containing items tentatively agreed upon and Harman consented to do so.

On September 12, 1972, Harman sent Fortenberry an 18-page "Working Agreement." In the covering letter, Harman noted that "Mr. Frederickson has been authorized to agree on a one-year term beginning on date working agreement is signed." It appears from Fortenberry's undisputed testimony that Harman's draft contained several provisions on which agreement had not previously been reached. Specifically, he referred to the arbitration clause which did not provide for "binding [mandatory] arbitration" but depended upon the consent of both parties. Also not agreed upon were the vacation eligibility condition and a narrow retention of benefits clause.

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At the Union's January 1973 membership meeting, Fortenberry reported on the terms of the Respondent's September 12 proposed contract. The members expressed dissatisfaction with certain items in that contract and other proposals were considered.[14] As a result of this meeting, Fortenberry on January 23, 1973 telephoned Harman and, in a brief conversation, informed him that the Respondent's employees wanted a 25-cent hourly wage increase, a hiring hall, binding arbitration, as well as the previously agreed-upon items, including retention of benefits. There is no testimony concerning Harman's response, if any. In the course of another telephone call made to Harman 2 days later concerning contract negotiations relating to another drilling company, Harman informed Fortenberry that Hondo wanted to give its employees a wage increase. Fortenberry responded with a request that they negotiate before any increase is granted.

Subsequently, the parties arranged for another bargaining session which was held on March 13, 1973. Here, too, no progress was made with respect to the parties' 60-90 day differences regarding eligibility for vacation, although Frederickson indicated that he would speak to the Board of Directors about the Union's position. This led to a discussion of a wage increase. The Company offered 5.5 percent in a 1-year contract. This meant an hourly increase of 17 cents for floorhands and 18 cents for derrickmen and

14 It appears that the Union filed an unfair labor practice charge on January 16, 1973, which was withdrawn with the Regional Director's approval on January 29, 1973 (Case No. 16-CA-5039).

motormen. The Union, on the other hand, repeated its requested 25-cent an hour across-the-board raise. Harman refused to yield on the Company's position, asserting that 5.5 percent was the limit under the Government wage freeze. When Fortenberry remarked that this created a problem, Harman commented that wages were not the only problem, apparently referring to the other disputed items. Fortenberry's suggestion that the Company seek Government approval of an increase in excess of the 5.5 percent was rejected by Frederickson. In the course of a further wage discussion, Fortenberry made it clear that the Union would not agree to any increase apart from a complete contract. Also considered on this occasion was the Company's proposal that insurance coverage for an employee should become effective 90 days after the beginning of employment. The Union requested a 60-day period. These differences were not reconciled. The net effect of these negotiations was that the parties arrived at no understanding on a contract or wage increase.

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Because he was planning to be out of town for a while, Harman about March 21, 1973 left a message for a member of his law firm, Joseph Connally, to inform Fortenberry of the Company's willingness to raise its prior 5.5 percent offered wage increase to 6.2 percent and to secure the Union's approval. Thereafter, either on the same day or March 22, Connally and Fortenberry discussed this matter in a telephone conversation while Business Manager Howell stood nearby at Fortenberry's end of the line. Connally inquired

whether the Union would accept a 6.2 percent increase effective immediately. In response, Fortenberry stated that the Union would agree provided a complete contract was consummated which included binding arbitration with a no-strike clause such as that embodied in the McVay Drilling Company contract which he had recently negotiated with Harman as McVay's attorney; a clause providing a week vacation a year for employees with less than 90 days of service interruption; a contract term of 1 year; and all the other provisions contained in the Company's September 12 draft.[15] Fortenberry also requested Connally to prepare and submit to him a draft of a contract embodying Fortenberry's proposition.[16] No such document was ever delivered to the Union, although the Respondent put into effect the 6.2 percent increase a few days after the above telephone conversation.[17]

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15 Fortenberry testified that Connally, in response to Fortenberry's proposal, stated that he saw no problem, thereby indicating acceptance of the proposal. Admittedly, Fortenberry's written summary of this conversation, which he prepared 3 months later, omits mentioning Connally's answer. Assuming, however, that Connally made the asserted reply, I do not interpret it as a commitment by Connally on the Company's behalf to accept Fortenberry's proposition. Indeed, in Howell's letters sent to Harman on June 11 and July 27, 1973, Howell referred to Connally's 6.2 percent offer and Harman's failure to forward a draft of an agreement containing terms previously negotiated by Fortenberry with *Harman himself*. In any event, I find no evidence that Connally, who had not participated in any of the negotiations since the Union's second certification, was authorized to bind the Company to Fortenberry's proposition.

16 In all negotiations, whether with Hondo or other clients of Harman, it was the practice for Harman to prepare drafts of contracts.

17 Frederickson testified that he presumed the 6.2 percent was acceptable to the Union without any conditions.

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2. Negotiations, unilateral action and withdrawal of union recognition subsequent to May 19, 1973

Fortenberry was hospitalized from May 14 to June 5, 1973[18] and did not return to his duties on a full-time basis until late in September. For this reason, Business Manager Howell undertook to handle the Hondo negotiations and correspondence.

On May 21, Harman wrote to Fortenberry, suggesting a negotiating session to "go through the contract (apparently referring to the September 12 one) and see just where we stand." By letter of May 23, Howell advised Harman of Fortenberry's hospitalization and that he would talk to Fortenberry about Harman's proposed meeting. On June 7, Howell sent Harman another letter in which he stated that Fortenberry would contact him as soon as he sufficiently recovered his health and resumed his normal duties. However, Howell added that, if this suggestion was not agreeable, he would make himself available for negotiations. Howell followed up this letter with another one on June 11 in which he stated:

> Mr. Fortenberry informed me that Mr. Joe Connally had called him in Hobbs, New Mexico, on either the 21st or 22nd day of March, 1973 in your behalf wanting to put into effect a 6.2% wage increase for Hondo employees immediately.

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18 Unless otherwise indicated, all dates hereinafter mentioned relate to 1973.

> Mr. Fortenberry informed Mr. Connally that the Union would agree if Mr. Connally would forward immediately a *draft of an agreement on subjects and items that had been agreed to in prior negotiating sessions between Mr. Fortenberry and yourself.*
>
> Please forward the draft of agreement to this office at your earliest convenience. I will then contact you on any questions regarding same that I may have. (Emphasis added).

When Harman failed to reply to Howell's request, Howell on July 27 again wrote Harman, expressing surprise that he (Howell) had not

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yet "received the draft of the agreements made in negotiations . . . between *yourself* and Business Representative Fortenberry," which he had requested in his June 11 letter, and urging that the draft be forwarded at Harman's earliest convenience. (Emphasis added).

Finally, on August 6 Harman sent Howell a letter in which he enclosed

> . . . the provisions of a working agreement which have been *tentatively* agreed to by both parties. *There are other provisions which have not been agreed upon and which will require further negotiation.*

> It is my understanding you have the right to secure approval of the employees before finally agreeing to the terms of the agreement and Mr. Frederickson must secure the approval of the Board of Directors.
>
> Please advise when you would like to negotiate further. (Emphasis added.)

According to Howell's testimony, the enclosed contract draft omitted the provisions which Connally had agreed upon in his above conversation with Fortenberry on March 21 or 22. Thus, he testified that the August 6 contract draft did not provide for binding arbitration but, instead, provided for arbitration only if agreeable to both parties; that it added in Section 6.3 language not previously negotiated, recognizing the Company's right unilaterally to give employees subsistence allowances;[19] that the draft omitted completely an insurance provision which was in the Company's September 12, 1972 draft, although the employee qualifying coverage date was in dispute; and that

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the August 6 draft did not contain retention of benefits and vacation clauses also included in the September 12 draft, although the Union had previously sought some changes in them. Howell admitted not calling

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19 Section 6.3 provided that "[i]n case of unusual locations involving rough terrain, long distances, etc., the Company may provide a subsistence allowance as it deems necessary, and the company may provide additional inducements on a temporary basis in order to secure and maintain sufficient crew members."

the foregoing matters to Harman's attention before the August 22 bargaining session for the asserted reason that he was trying to arrange a meeting to negotiate on these items. Harman, on the other hand, testified in conformity with his letter that the August 6 draft was intended to reflect only those provisions which had been tentatively agreed to in the earlier negotiations. It is clear, however, that the Union had never accepted, at least, the noncompulsory arbitration clause mentioned in the August 6 draft.

Thereafter, the parties scheduled a negotiating session for August 22. In the meantime, the Union learned on August 16 that the Respondent had unilaterally decided to pay "bottom hole" money or bonus[20] to employees working on Rig 3.[21] It appears that on or about August 5 the Respondent posted on Rig 3, then operating on C & K Petroleum's Lowe State No. 1, the following notice signed by Drilling Superintendent Frederickson:

> Crew members who work continuously from date of hire to well completion will receive a subsistence allowance equal to 10% of their gross pay for such period of continuous work.

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20 Bottom hole money or bonus is money paid to employees provided they remain on the particular job until the well is completed. It differs from subsistence which is generally given to employees in addition to their regular pay to compensate them for the distance they have to travel to the job and other difficulties encountered to reach it. However, the employees' right to subsistence normally does not depend upon the completion of the well.

21 Originally, Howell was under the erroneous impression that the bottom hole pay was applicable to other rigs and jobs. This impression was subsequently corrected by Frederickson at the August 22 bargaining session.

> This is to be paid on the pay period following the completion of the well to *employees completing this well.*

Frederickson testified that the C & K Petroleum job was a long distance from the crews' living quarters and involved unusual dangerous gas and other difficult problems. For this

reason, he testified, it was necessary to offer the men this special 10 percent allowance in order to induce them to work on this job and to remain until completion of the well. Frederickson further testified — and in this he was corroborated by Harman —, that before he accepted the C & K Petroleum job, he consulted with Harman whether he could give the employees this bottom hole money without negotiating with the Union and was advised that he could do so because Frederickson had given it before and it was customary in the oil fields to pay such money under comparable circumstances, although the occasion infrequently arose. Frederickson also testified that the last time he paid bottom hole pay before this occasion was in 1969. It was stipulated that the bottom hole allowance was given only on Rig 3 and covered the payroll periods ending August 12 through September 23. It further appears that this allowance was also subsequently paid to the crewmen operating Rig 3 on another location where comparable problems existed for the pay periods of November 18, 1973 through January 13, 1974. However, in both instances, only the roughnecks who remained until the completion of the well actually received the bonus.

On August 22, about 5 months after their last bargaining session, Howell met with Harman and Frederickson. Howell started off the discussions by alluding to the Connally-Fortenberry telephone conversation in March, claiming that agreement had there been reached on such items as binding arbitration with a no-strike clause, as embodied in the McVay contract, and vacations, and that Connally had undertaken to reduce this agreement to contract form for signature. In addition, Howell pointed out that such a signed contract had never been forwarded to the Union and that the Respondent had reneged on Connally's agreement. Instead, Howell asserted, Harman sent the Company's August 6 draft which omitted Connally's accepted terms, as well as other items in the September 12, 1974 draft such as insurance where only the employee coverage eligibility period was in dispute. Furthermore, Howell commented that he had not filed an unfair labor practice charge in the hope that the parties would get together and sign a contract. Frederickson's answer to all this was that Connally lacked the authority to bind the Company.[22] This elicited Howell's response that the Company received the Union's approval of the 6.2 percent wage increase in return for a complete agreement.

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22 Frederickson testified that shortly after the March Connally-Fortenberry conversation, he spoke to Connally on the telephone solely with respect to the 6.2 percent wage increase which he presumed Fortenberry had accepted. There is an apparent testimonial conflict whether Frederickson stated at the August 22 meeting that in his March conversation with Connally, the latter wanted to send him a draft of a contract for signature but Frederickson told him not to do so and asked Connally to have Harman contact Frederickson upon Harman's return from his trip. As I have found that Connally did not possess the authority to commit the Respondent to a complete contract, it is unnecessary to resolve this conflict. In this connection, it is noted that the amended complaint does not allege an unlawful refusal to sign an agreed-upon contract.

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Howell then raised the question of the Respondent's unilateral grant of the 10 percent bottom hole pay, contending that it related to a term and condition of employment and should be negotiated. Harman argued that it was not a bargainable matter as the Respondent had paid bottom hole money before. Howell threatened to file a charge, which he ultimately did, and the matter was dropped after further argument.

Howell also initiated a discussion of subsistence pay as part of an incentive safety program which he claimed had been instituted by several of the Respondent's competitors. In addition, Howell proposed a special allowance (apparently bottom hole pay) of $5 a day for the crews on Rig 3 only but nothing conclusive was decided. A follow-up meeting was then tentatively scheduled for August 27 and Frederickson agreed in the meantime to take up the Union's requested contract with the Respondent's Board of Directors.[23]

No meeting was held on August 27 and the parties were unable to reschedule an early bargaining session convenient to both sides. On October 2, Howell reminded Harman that he had not heard from him regarding a negotiating date, although Harman's secretary had advised Howell that Harman would communicate with him when he returned from vacation. On October 17, however,

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23 The foregoing findings concerning the August 22 meeting is based on a composite of Howell's and Harman's testimony which I believe reflects what probably occurred there.

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Harman wrote Howell that Hondo proposed to increase the hourly wage rate of floorhands from $3.40 to $3.68, and of derrickman and motormen from $3.50 to $3.80, effective the pay period beginning October 27, 1973 and requested to be advised whether this increase met with the Union's approval. The next day, Harman notified Howell that the correct effective date of the increase was October 22, 1973.

Upon receipt of the foregoing notices of proposed wage increases, Howell telephoned Harman on October 19 and arranged for a meeting on October 31 to negotiate on this matter. On the same day, Howell sent Harman a letter in which, after confirming this conversation, accused the Company of not bargaining in good faith, adding:

> . . . You only propose in your letter dated October 17, 1973 to raise wages and ignored my requests for negotiations for a complete working agreement. I strongly object to the pattern you have established in only notifying the Union two or three days in advance of the effective date of when the Company proposes a change.
>
> As I advised you and Mr. Frederickson in our meeting on August 22, 1973, Mr. Joe Connally had agreed to a complete contract back in March of 1973 with Mr. J. D. Fortenberry and the reason I had not filed charges was in an effort to reach an agreement on the date of our meeting on August 22, 1973.

> Therefore, please be prepared to negotiate until a full agreement is reached as I feel the Company has intentionally avoided meeting with the Union on a regular basis in an effort to stall and delay the signing of an agreement.

Howell also requested a current list of unit employees and their home addresses which information he stated was needed because of the long delay between meetings.

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In the meantime, Harman prepared a new contract draft containing a number of changes in provisions embodied in the previous draft. The new proposed contract received advance approval from the Respondent's Board of Directors and Frederickson was authorized to sign that document if the contract was acceptable to the Union. Thereafter, on October 31, a relatively short bargaining session was held. At this meeting, Harman handed Howell the previously requested list of current employees together with the latest draft of an agreement which Harman described as a contract the Company was willing to execute then and there. Upon reviewing the draft, Howell voiced objection to several provisions. These included the retained nonmandatory arbitration clause (Section 5.1); the clause reserving to the Company the unilateral right to grant subsistence allowances to employees, which was previously included in the August 6 draft (Section 6.3); the clause recognizing the Company's unilateral right to grant wage increases to meet competition (Section 7.1), which provision had

never before been the subject of discussion;[24] the vacation provision which granted a 1-week vacation a year to employees with less than 60 days of uninterrupted service (Section 11.1); and wage increases in excess of those offered in Harman's letter of October 16 ($3.90 an hour for derrickmen and motormen and $3.80 an hour for floormen).

In the course of this meeting, Howell presented a written hiring hall proposal substantially similar to that submitted at an earlier negotiation session. He, however, made it clear that the Union was not committed to this language but that the Union would be satisfied with the language in the contract of Tri-Service Drilling Company, another employer represented by Harman. Howell then commented that the Union was also involved in negotiations with other drilling companies to whom new proposals relating to wages and other benefits to

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be approved by the membership would be submitted. He further informed the Respondent that such proposals would also be forwarded to Harman. In an-

24 In addition to establishing wage rates, Section 7.1 provided:
. . . Due to the competition for crew members any time a group of competitors increase wages it has the effect of depriving this Company of crew members. Therefore, any time Company determines it is necessary to increase wages because a group of competitors have increased wages, it may do so unilaterally provided it immediately notifies the Union of such increase. And provided further, the Company will meet with the Union during a period of 5 to 10 days after the increase, to negotiate whether a further increase should be granted, but only if the Union requests the meeting.

swer to Frederickson's inquiry whether, in the meantime, the Respondent could put into effect the increases offered in its latest contract proposal, Howell gave a negative response. However, Howell noted that he would call a meeting of Hondo employees to vote on the Company's proposals and that he would advise the Company of the employees' decision. Frederickson expressed the hope that the employees would accept the increase, remarking that he was aware that the Union could strike the Company and, if it did, the Company would have shut down the rigs. This was the last of the bargaining meetings.[25]

Thereafter, the Union scheduled a morning and evening meeting of Hondo employees on November 7. In a letter dated November 1 notifying the employees of this meeting, they were advised of the October 31 negotiations in which the Company offered a 40-cent an hour increase, "without any method of resolving grievances except to strike if the Company did not want to go to arbitration." The letter further mentioned the Company's request "to retain the right to give . . . wage increases at their option," and the Union's proposed hiring hall. Urging the employees "to attend one of these Special Meetings and have a voice in what wages and benefits you will be required to work under," the letter reminded them of the existing "extreme shortage of crew members and [that this was] . . . the time to get the benefits and protection in a contract that you deserve.

25 The foregoing findings relating to the October 31 meeting are based on the substantially uncontradicted testimony of Howell and Harman.

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Following these union meetings, Business Representative Fortenberry on November 12 advised the Company that the Union's members had rejected the Company's October 31 proposal. In this letter, Fortenberry also listed eight counterproposals several of which were new demands pertaining to a union shop with respect to the Company's New Mexico operations (No. 3); shift differentials (No. 4); a cost of living escalator clause (No. 5); and a free meal where the employees work 2 hours beyond quitting time (No. 7). Concluding, Fortenberry requested a date for further negotiations.

On November 14, Harman responded with a summary withdrawal of recognition, as follows:

> Mr. Walter Frederickson telephoned me this morning and stated the company does not believe the Union represents a majority of bargaining unit employees and, therefore, refuses to recognize [the Union] . . . as the bargaining representative of its employees.

The particular grounds to which Frederickson testified in justification of his action will be discussed in the Concluding Findings section of this Decision.

On the same day, the Respondent posted a notice over Frederickson's signature, announcing effective November 12 an hourly wage increase for derrickmen and motormen from $3.50 to $3.90 and for floormen

from $3.40 to $3.80.[26] These were the same increases offered in the Respondent's proposed October 31 contract. A copy of the posted announcement was mailed to the Union. Harman testified that the reasons the increases were granted at that time were that the employees wanted them and the Respondent had to keep up with its competitors who had already given their employees such raises.

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In the first week of December, the Respondent granted its employees another wage increase of 6 cents an hour effective December 3. According to Harman's testimony, this increase was prompted by information Frederickson had acquired that the Company's wage rates were still below those of its competitors and that the additional 6 cents brought them in line with the Company's "primary competitors."

C. *Concluding Findings*

As indicated above, it is the General Counsel's position that since May 19, 1973 the Respondent failed to bargain in good faith in a genuine effort to reach agreement with the Union; that for this reason the Respondent was precluded from questioning the Union's majority status and withdrawing recognition on

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26 The posted notice also announced an increase for drillers, who were supervisors of the crews, effective October 22.

November 14, 1973; that, in any event, the Respondent's withdrawal of recognition was not based on objective considerations justifying a reasonable doubt of the Union's continued majority support; and that by the foregoing conduct, as well as by its action in unilaterally granting bottom hole pay on or about August 5, 1973, and wage increases in November and December 1973, the Respondent violated Section 8(a)(5) and (1) of the Act. The Respondent, of course, denies that it breached its bargaining obligation in any of the indicated respects. For the reasons set forth below, I find that, although the record does not establish overall bad faith bargaining on the Respondent's part, its withdrawal of recognition and unilateral action were in violation of the Act.

With respect to the Respondent's alleged overall bad faith bargaining

Section 8(a)(5) of the Act requires an employer to recognize and bargain collectively with the statutory representative of his employees with respect to their terms and conditions of employment. Section 8(d) defines the bargaining obligation as requiring the parties, *inter alia*, "to meet at reasonable times and confer in good faith [regarding such matters]. . . or the negotiation of an agreement . . . and the execution of a written contract incorporating any agreement reached if requested by either party. . . ." Although this obligation does not "compel either party to agree to a proposal

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or require the making of a concession," it does contemplate, as the Board and the courts have uniformly

held, a willingness to enter the discussions "with an open mind and purpose to reach an agreement consistent with the respective rights of the parties."[27] Simply entering "upon a sterile discussion of union management differences,"[28] is not sufficient. Essentially then, the "ultimate issue whether the Company conducted its bargaining negotiations in good faith involves a finding of motive or state of mind which can only be inferred from circumstantial evidence."[29]

Applying these principles to the facts of this case, I find insufficient evidence in the record that during the period from May 19 to November 14, 1973, when the Respondent withdrew recognition, the Respondent negotiated in bad faith with no intention of entering into any final or binding collective bargaining contract. Without repeating the details, it is clear that, while agreement had been reached on a number of items, there were others where serious differences developed between the parties. The parties' inability to resolve these differences can no more be attributed to the Respondent's inflexibility than to the Union's. Considering all the facts and circumstances surrounding the negotiations, the Respondent's conduct amounted to no more than hard bargaining which the Act does not condemn.

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27 *Majure Transport Company v. N.L.R.B.*, 198 F.2d 735, 739 (C.A. 5); see also *N.L.R.B. v. Johnson Manufacturing Company of Lubbock*, 458 F.2d 453 (C.A. 5); *N.L.R.B. v. Darlington Veneer Company, Inc.*, 236 F.2d 85, 88-89 (C.A. 4).

28 *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 402.

29 *N.L.R.B. v. Reed & Prince Manufacturing Company*, 205 F.2d 131, 139-140 (C.A. 1), cert. denied, 346 U.S. 887.

The General Counsel, nevertheless, urges as evidence of bad faith bargaining, the Respondent's failure to embody in a contract Attorney Connally's alleged telephone acceptance on March 21 or 22, 1973 of the Union's proposals with respect to certain disputed items. However, apart from the fact that that telephone conversation occurred outside the 6-month

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limitation period, I have found that Connally neither committed the Respondent to acceptance of the items in question nor possessed the authority to do so.

Also relied upon by the General Counsel as indicative of the Respondent's bad faith approach to the negotiations, is the omission from the August 6 contract draft of clauses dealing with retention of benefits, vacations and insurance. However, as found above, complete agreement on these subjects had not previously been reached by the parties and the Respondent's letter accompanying this document explicitly stated that the draft embodied provisions which had been "tentatively agreed to" and that there were other provisions which had not been agreed upon and required further negotiations. In these circumstances, an inference of bad faith bargaining from the asserted omissions is certainly unwarranted. Moreover, the subjects in question were subsequently included in the Respondent's last proposed contract which it submitted to the Union on October 31, 1973.

In further support of his contention that the Respondent bargained in bad faith, General Counsel alludes

to the provisions in the Respondent's August 6 and October 31 drafts reserving to itself the unilateral right to grant employees a subsistence allowance in case of the unusual location of its rigs and to the provision in its October 31 draft recognizing the Company's right to grant wage increases to meet competition without prior negotiation with the Union. However, proposals of this nature are clearly bargainable matters and do not necessarily establish a disposition to avoid agreement, as the General Counsel suggests.[30] Moreover, it is incomprehensible to me how, as the General Counsel also urges, the Respondent's offer in the October 31 draft of a wage increase in excess of that previously offered to the Union impugns the sincerity of the Respondent's negotiations. Lastly, although I find below that the Respondent's action in granting employees bottom hole pay on or about August 5 without first conferring with the Union violated its statutory obligation, and may in another

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context indicate bad faith bargaining, I am not convinced that under the particular facts and circumstances of this case, such conduct reflects adversely on the Respondent's entire course of dealings with the Union.

In sum, I find that the General Counsel failed to prove that the Respondent's conduct prior to its withdrawal of union recognition did not comport with the standards of good faith bargaining or that the Respondents utilized its October 31 contract proposal as a tactic to avoid agreement.

30 Cf. *N.L.R.B. v. American National Insurance Co., supra.*

With respect to the Respondent's withdrawal of union recognition

In *Laystrom Manufacturing Co.*,[31] the Board reviewed the principles governing an employer's continuing duty to recognize and bargain with a union which had previously been certified by the Board as his employees' exclusive representative, as follows:

> Absent unusual circumstances, there is an irrebuttable presumption that the majority status of a certified union continues for 1 year from the date of certification. After the first year the certificate still creates a presumption of majority status, but the presumption is normally rebuttable by an affirmative showing that the union no longer commands a majority. Moreover, where the certificate is a year or more old an employer may withhold further bargaining without violating the Act and insist that the union reestablish its statutory representative status if, but only if, he in good faith has a

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> reasonable doubt of the union's continuing majority.

31 151 NLRB 1482, 1483-1484. Although enforcement of the Board's bargaining order was denied (359 F.2d 799 (C.A. 7)), the court did so only because of its disagreement with the Board's finding that the employer questioned the Union's majority status in bad faith and not because it disagreed with the Board's statement of governing principles. See *Automated Business Systems*, 205 NLRB No. 35, 8, fn. 8.

> A showing of such doubt, however, requires more than an employer's mere assertion of it and more than proof of the employer's subjective frame of mind. The assertion must be supported by objective considerations. The applicable test, as defined in the *Celanese* case, is whether or not the objective facts furnish a "reasonable basis" for the asserted doubt, or, put another way, whether or not there are "some reasonable grounds for believing the Union has lost its majority status since its certification. (Citations omitted.)

Clearly, the burden of proving a good-faith, reasonably grounded doubt of the union's continued majority status rests upon the employer.[32] However, such a defense is not available where the withdrawal of recognition occurred in the context of unfair labor practices.[33]

At the outset, it may be well to dispose of the General Counsel's contention that the Respondent is precluded from questioning the Union's majority because of the Respondent's overall bad faith bargaining. Having found the allegation of bad faith bargaining not sustained by the evidence, the contention is rejected. Nor am I persuaded that the isolated instance of unilateral granting of bottom hole pay on or about August 5 to employees working on Rig 3 is sufficient, under the

32 *Terrell Machine Company*, 173 NLRB 1480, 1481, enfd. 427 F.2d 1088 (C.A. 4), cert. denied 398 U.S. 929; *Nu-Southern Dyeing & Finishing Inc.*, 179 NLRB 573, fn. 1.

33 *Celanese Corporation of America*, 95 NLRB 664, 673; *Nu-Southern*, *supra*.

special circumstances of this case, to warrant depriving the Respondent of the defense of good faith doubt, assuming that the defense could otherwise be established. We turn to the consideration of the reasons for the Respondent's asserted doubt.

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As discussed above, the Respondent suddenly withdrew recognition by letter dated November 14, 1973 and refused to proceed with further negotiations. This was the first time the Respondent had ever raised the question of the Union's majority status since the Union's second certification 20 months earlier, although the Union's status apparently had not changed much during the intervening period. Moreover, the withdrawal of recognition occurred only after the Union had indicated its unwillingness to accept all of the terms embodied in the Respondent's contract proposal presented to the Union at the October 31, 1973 bargaining session but, instead, put the Respondent on notice that it intended to submit additional proposals of its own. Furthermore, the withdrawal of recognition followed immediately after the Union in its letter of November 12 advised the Respondent of its membership's rejection of the Respondent's October 31 contract proposal and listed its additional counterproposals.

Against this background, the Respondent urges the following considerations which assertedly prompted it to question the Union's majority status:

The unusual high labor turnover. There is no dispute that the Respondent experienced a high rate of turnover among the roughnecks it employed on its rigs in the Permian Basin area. It is clear, however, that this situation is characteristic of the oil and gas drilling industry in that area where roughnecks are generally hired for relatively short periods of time and freely move from one drilling job to another. To accommodate its election procedures to such turnover, the Board, with court approval, devised the so-called *Hondo* voting eligibility formula previously described. Moreover, the Board has recently held on the basis of employment facts comparable to those involved in the present case that this high rate of turnover among roughnecks, considered alone or in conjunction with other facts, does not provide a justifiable ground for doubting the majority status of the union which had won Board certification several years before.[34] I find no reason to hold otherwise in the present case especially since the record is barren of any

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evidence of employee dissatisfaction with the Union's representation. As noted in the cited *Leatherwood* and *Brahaney* cases, a change in personnel does not necessarily mean that the new employees are not interested in being represented by the incumbent certified union in collective bargaining with their employer.[35]

34 *Leatherwood Drilling Company*, 209 NLRB No. 92; *Brahaney Drilling Company*, 209 NLRB No. 93. The Union in the present case also represented the employees of the employers in the cited cases.

35 See also *Laystrom Manufacturing Co.*, 151 NLRB 1482, 1484; *Printers Service Inc.*, 175 NLRB 809, 812; *Harpeth Steel, Inc.*, 208 NLRB No. 84, 4.

Accordingly, I find that the high rate of turnover relied upon by the Respondent is insufficient to warrant an inference that the Union no longer enjoyed majority support when recognition was withdrawn.

The Union's alleged refusal to bargain in good faith on and after October 31, 1973: The Respondent also asserts that, in deciding to withdraw recognition from the Union, it relied on the Union's refusal to negotiate a full contract at the October 31 meeting but, instead, subsequently submitted new proposals never before offered. I find nothing in the Union's conduct at this meeting or in the new proposals which could reasonably suggest to the Respondent that its employees had rejected union representation. The most that can be said is that the Union was seeking better contract terms than those the Respondent was offering. Indeed, the Respondent itself was seeking to improve its bargaining position when at the October 31 meeting it presented its last contract proposal containing several new terms. All things being considered, I find no plausible reason in the indicated events for doubting the Union's majority status.

The Union's alleged efforts to dissuade employees from working for the Respondent: Drilling Superintendent Frederickson testified that he was influenced to withdraw recognition by reports he had that the Union unsuccessfully attempted to persuade employees to stop working for the Company or to refuse employment with it. However, I find these alleged reports wholly unsubstantiated by any probative evidence. Moreover, it is well settled that a union's unsuccessful

efforts to persuade employees to withhold services from their employer does not necessarily indicate that the employees are no longer interested in union representation. It is not uncommon for employees to refuse to follow their bargaining agent's advice for economic and other reasons and yet favor the union's continued representation.[36] I, therefore, find no justification in the above reports for questioning the Union's majority. Indeed, as previously discussed, Frederickson at the October 31 meeting expressed his awareness that the Union could, if it wanted, call a strike against the Company and thereby cause the rigs to shut down.

Alleged lack of employee enthusiasm for the Union: The Respondent contends that this attitude was evidenced by the roughnecks' inquiries made of the toolpushers as to when they would receive wage increases which other roughnecks were then getting in the oil fields. I am unable to find anything in these inquiries which demonstrate displeasure with union representation. In fact, there is evidence that at a union meeting the membership had rejected the Respondent's October 31 contract proposal containing a 40-cent hourly wage increase. Accordingly, I find that the roughnecks' wage raise inquiries were not of such a nature as to raise a reasonable doubt that the Union lost majority support.

In sum, I conclude that the Respondent's withdrawal

36 Cf. *Food Service Company*, 202 NLRB, No. 107, JD 37; *Kentucky News, Incorporated*, 165 NLRB 777, 779.

of union recognition and its refusal to resume contract negotiations constituted a breach of its statutory bargaining obligation and that the Respondent thereby violated Section 8(a)(5) and (1) of the Act.

With respect to unilateral action

It is conceded that on or about August 5, 1973, the Respondent instituted bottom hole pay amounting to 10 percent of gross earnings for roughnecks working on Rig 3 until completion of the well. It is also undisputed that this allowance was granted without first notifying and discussing this matter with

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the Union. In fact, the Respondent admittedly did not regard the bottom hole pay a bargainable matter. Such unilateral action, relating as it did, to wages and other terms and conditions of employment, amounted to a breach by the Respondent of its bargaining obligation violative of Section 8(a)(5) and (1) of the Act, irrespective of its good or bad faith.[37] The fact that the Respondent might have paid bottom hole money in 1969 does not convincingly demonstrate that this was a long established condition of employment which exculpated its action 4 years later. Nor does the fact that such pay was needed as an inducement to recruit and retain roughnecks for a difficult and dangerous job excuse its institution since it does not appear the Respondent lacked the opportunity to consult with the Union before providing bottom hole pay.

37 *N.L.R.B. v. Benne Katz*, 369 U.S. 736.

As for the Respondent's unilateral grant of across-the-board wage increases in November and December 1973, I find this conduct similarly violative of Section 8(a)(5) and (1) of the Act. As found above, this action was taken after the Respondent had unlawfully withdrawn recognition from the Union and refused to engage in further bargaining with the Union.

IV. The Remedy

Pursuant to Section 10(c) of the Act, as amended, it is recommended that the Respondent be ordered to cease and desist from engaging in the unfair labor practices found and in any like or related conduct and take certain affirmative action designed to effectuate the policies of the Act. To remedy the Respondent's unlawful refusal to fulfill its statutory obligation, it is further recommended that it recognize the Union as the certified bargaining representative of the Company's employees in the unit found appropriate herein and that, on request, it resume negotiations with that organization concerning rates of pay, wages, hours of employment and other conditions of employment. An appropriate notice for posting is also recommended.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

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Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All derrickmen, motormen and floorhands, otherwise referred to as roughnecks, employed by the Respondent in drilling operations in the area generally known as the Permian Basin, but excluding all toolpushers, drillers, office employees, technical employees, guards, professional employees and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. By withdrawing on November 14, 1973, recognition from the Union as the exclusive representative of the employees in the aforesaid appropriate unit, and by thereafter refusing to resume negotiations and bargain with the Union, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By unilaterally granting its employees in the above unit bottom hole pay on or about August 5, 1973, and across-the-board wage increases on or about November 14 and December 3, 1973, without first notifying and bargaining with the Union over these matters, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent has not engaged in overall bad faith bargaining in violation of Section 8(a)(5) and (1) of the Act; nor has it violated Section 8(a)(1) of the Act by threatening employees that if they did not accept, and if the Union did not approve, a 40-cent hourly wage increase, the Respondent would "stack" the rigs.

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Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, as amended, I hereby issue the following recommended:[38]

ORDER

The Respondent, Hondo Drilling Company, N.S.L., Midland, Texas, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with Local 826, International Union of Operating Engineers, AFL-CIO, as the exclusive representative

38 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

of the employees in the unit described below, concerning rates of pay, wages, hours of employment, and other conditions of employment:

> All derrickmen, motormen and floorhands, otherwise referred to as roughnecks, employed by the Respondent in drilling operations in the area generally known as the Permian Basin, but excluding all toolpushers, drillers, office employees, technical employees, guards, professional employees and all supervisors as defined in the Act.

(b) Unilaterally granting wage increases or bottom hole pay or instituting any other changes in terms and conditions of employment, without first notifying and bargaining with the above-named Union as the employees' exclusive bargaining representative.

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(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their bargaining rights through the above-named Union, which are guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act;

(a) Upon request, bargain collectively with the above-named Union, as the exclusive representative of all the employees in the unit described above, concerning rates of pay, wages, hours of employment,

and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its offices and yards in Midland, Texas, and at all its other locations in the Permian Basin area, copies of the attached notice marked "Appendix."[39] Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 16, in writing, within 20 days from the receipt of this Order, what steps the Respondent has taken to comply herewith.

> IT IS FURTHER ORDERED that the allegations of the amended complaint that the Respondent engaged in overall bad faith bargaining in violation of Section 8(a)(5) and (1)

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39 In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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of the Act and that it threatened employees in violation of Section 8(a)(1) of the Act be, and they hereby are, dismissed.

Dated at Washington, D.C., May 20, 1974.

/s/ PAUL BISGYER
Paul Bisgyer
Administrative Law Judge